

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

JOE ANDREW SALAZAR,

Plaintiff,

v.

AT&T MOBILITY LLC,
SPRINT/UNITED MANAGEMENT
COMPANY, T-MOBILE USA, INC.,
AND CELLCO PARTNERSHIP D/B/A
VERIZON WIRELESS,

Defendants

and

HTC CORP., and HTC AMERICA, INC.,

Intervenors.

Civil Action No. 2:20-cv-00004-JRG

JURY TRIAL DEMANDED

**DEFENDANTS' AND INTERVENORS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS**

Pursuant to Local Rule CV-7(k), Defendants AT&T Mobility LLC, Sprint/United Management Company, T-Mobile USA, Inc., and Cellco Partnership d/b/a Verizon Wireless (collectively, "Defendants") and Intervenors HTC Corp. and HTC America, Inc., file this supplemental brief presenting additional evidence to clarify the record in support of their Motion to Dismiss Under Rule 12(b)(6) (the "Motion," Dkt. No. 27). This supplemental brief is being filed as an exhibit to Defendants' and Intervenors' motion for leave under Local Rule CV-7(k).

I. Salazar’s recent admission confirms that this case is barred by claim preclusion.

In his sur-reply, Salazar argued that Defendants’ assertion of privity with HTC Corp. for purposes of claim preclusion was “self-serving” and “indefensible.” (Dk. No. 63, at ¶ N.) But recently, in an attempt to preclude Defendants and Intervenor from presenting their claim construction positions, Salazar conceded that privity does exist between Defendants and HTC Corp. He made that admission in his draft Joint Claim Construction and Prehearing Statement, which was provided by Plaintiff’s counsel to the undersigned counsel on April 28, 2020, and is attached hereto as “Exhibit 1.” In that document,¹ Salazar conceded that Defendants are in privity with HTC Corp.:

In *Salazar v. HTC Corp.*, (2:16-cv-01096-JRG), *Defendants’ privity* and Intervenor in this case, HTC Corp., previously asserted (in the parties’ P.R. 4-3 disclosure) that it “objects to expert testimony because only intrinsic evidence is relevant to claim construction in this case.” *See* Exhibit C. Defendants now assert that they will rely on expert testimony. Consistent with the principles of issue preclusion, Plaintiff asserts that Defendants should be precluded from introducing extrinsic evidence that they both argued was inappropriate and they did not introduce in the prior case.

(emphasis added); *see also* Dkt. 91 at 4-5 & n.1.

The existence of privity between Defendants and HTC Corp. was the only element of claim preclusion that was ever potentially in genuine dispute in the briefing. (*See* Dkt. No. 27 at 7-9 (citing *Senju*, 746 F.3d at 1349; *Nystrom*, 580 F.3d at 1285; *Oreck*, 560 F.3d at 401; *Russell*, 962 F.2d at 1173; *Aerojet*, 511 F.2d at 719, etc.).) Salazar’s argument that claim preclusion should not apply (because he incorrectly asserted that *Salazar I* and *Salazar 2* do not present the same claim even though they both claim patent infringement of the same patent by the same HTC

¹ Plaintiff deleted his admission from the filed version of the Joint Claim Construction and Prehearing Statement, attempting to characterize his admission as an “assumption” in response to Defendants and Intervenor identifying the issue for the Court in the statement. *See* Dkt. No. 91 at 4, fn. 1 (“As Defendants and Intervenor reference below, in a previous draft, Plaintiff assumed that Defendants and Intervenor were to be treated in privity.”).

smartphones) also implicitly relied on his now-debunked assertion of no privity. *See* Dkt. No. 40 at 9 (“These actions, and HTC Corp.’s own admissions, establish that treating the two cases as a unit does not conform to the parties’ expectations or business understanding or usage. *See Petro–Hunt*, 365 F.3d at 396. Accordingly, the cases do not share the same claim or cause of action.”). Given Salazar’s recent concession on privity, the record is clear that this case is claim-precluded and should be dismissed.

Dated: June 3, 2020

Respectfully submitted,

By: /s/ Fred I. Williams

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served this 3rd day of June, 2020, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Fred I. Williams